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Current Topics.

Ambassadors.

THE grave attack upon our Ambassador near Shanghai, which has shocked the whole world, is one, happily, of a kind of rare occurrence in the annals of diplomacy. For centuries both the person and the property of ambassadors have been regarded as sacrosanct—a condition of things absolutely essential for the efficient discharge of the official duties to be carried out by them in the countries to which they are accredited. In early days, it is interesting to note, ambassadors were called "orators," the reason, apparently being, because each made an oration on behalf of his Sovereign to the head of the State to which he was sent. According to BAGEHOT, an ambassador was not simply an agent, he was also a spectacle, and it seemed that nations behaved as if they cared more for the spectacle than for the duty which he discharged. Till comparatively recent years, an ambassador normally left this country in a ship of war, and in still earlier days he was met on landing in the country to which he was accredited by the master of the ceremonies and conveyed in the royal coach to the capital where he made what was termed "the solemn entry." But, as was said by the author of the monograph on Foreign Relations in the English Citizen Series, "the stage coach in the first instance, and the railway in our own time, have done more to establish equality than all the doctrines of all the encyclopædists; and even kings and their representatives find a convenience in using the conveyances which are at the disposal of the poorest citizens." In the Middle Ages we are told that truth was not expected, and falsehood was not condemned, in a minister; and in the days of QUEEN ELIZABETH we read that Sir HENRY WOTTON, himself an envoy, punningly described an ambassador as an honest man sent to "lie" abroad for the good of his country. In days nearer our own many distinguished statesmen have deplored this doctrine and have urged the importance of truth. "It is scarcely necessary to say," wrote LORD MALMESBURY, "that no occasion, no provocation . . . can need, much less justify, a falsehood." This represents the ideal to be aimed at and practised in diplomacy just as in the ordinary business of life.

Road Traffic Courts.

WE have received in the form of a 27-page booklet further elucidation in the light of recent events of the proposals made a couple of years ago at the Provincial Meeting of The Law Society by Mr. R. GRAHAM PAGE, LL.B., with reference to the setting up of some 500 road traffic courts throughout the country. These proposals were duly alluded to in our columns, and, notwithstanding their intrinsic interest—which the events of the past two years have done nothing to lessen—they cannot again be treated in detail at this stage. It may, however, be briefly recalled that Mr. PAGE advocated the setting up of one body to investigate the causes of road accidents, to adjudicate upon the public and private rights and liabilities arising therefrom, and to advise upon legislation for the prevention thereof. The unifying factor of this body would thus be the subject-matter with which it was concerned, and its functions would be both judicial and administrative, and also, in an advisory capacity, legislative. Such a proposal presents obvious difficulties and is reminiscent of the older type of *ad hoc* local government legislation, which doubtless did good service in its day; but whatever views may be entertained as to the feasibility or desirability of Mr. PAGE's proposals, there can be no two views as to the reality of the evils which they are designed to combat. In the course of an introductory section to the booklet, which consists, in substance, of the paper read at The Law Society's Provincial Meeting already referred to, the writer alludes to propaganda, the improved layout and construction of roads, and the better control of road traffic as the three main factors in the direction of reform, and rightly insists, in regard to the third of these, on the importance of knowledge obtainable by investigation. "Of the 211,000 road accidents which occur each year," it is said, "only those which are fatal, those which involve some offence punishable by law and those in which the insurance companies cannot agree upon liability or the extent of damage, ever receive exhaustive inquiry." Moreover, it is pointed out, the cases which come before the courts do not necessarily receive investigation directed towards the problem of how such an accident can be prevented in future. Mr. PAGE

would like to see traffic courts composed of traffic judges, assisted by lay "advisers," who should combine with technical knowledge the outlook of the man in the street. Reference is also made to recent police developments in connection with the training of men with a view of assistance and education of road users upon a principle of control rather than persistent prosecution. Mr. PAGE sees in this the germ of the separate traffic patrol and advocates the appointment of such patrols, who would be attached to the proposed traffic prosecutor's office, take over all duties of traffic control and the enforcement of traffic regulations, report traffic offences for prosecution, and, of course, readily fit in with the system of road traffic courts.

Local Government Superannuation Act, 1937: Circular.

IN the course of a Circular (No. 1644) sent to local authorities, the Minister of Health adverts to certain of the provisions of the Local Government Superannuation Act, 1937, to which it may be as well shortly to draw readers' attention. The Act, it will be remembered, requires provision to be made for the superannuation of all whole-time officers in the employment of local authorities and enables provision to be made for the superannuation of servants and part-time officers pursuant to a statutory resolution. These provisions will not become operative until 1st April, 1939, the appointed day; but, the circular states, certain action will fall to be taken by local authorities in advance of that date for the purpose of bringing the Act into operation. Mention is made of the responsibilities which will be incurred from and after the appointed day by the larger local authorities, and others which have adopted the Act of 1922, as "administering authorities" under s. 1 for maintaining superannuation funds. Section 2 of the Act, which deals with schemes for the maintenance of a joint superannuation fund by two or more such authorities, does not specify any date for the submission of such schemes for the Minister's approval, but the circular intimates that in such cases it would be necessary to take steps at an early date. Modifications of existing combination schemes must be submitted not later than 1st April, 1938 (see s. 2 (3)). Provision, under s. 4, for the superannuation of the contributory employees of an employing authority other than an administering authority will, it is said, in general be made through the superannuation fund of the county council in accordance with regulations to be made by the Minister under s. 36 (6) and the 3rd Sched., para. (5), and attention is drawn to the importance of bringing up to date particulars in regard to employees of these employing authorities with a view to supplying to the administering authorities the particulars they will require for the discharge of their obligations. Authorities which have adopted the Act of 1922 and have obtained, by local legislation or statutory orders, provisions modifying that Act, are required, in order to preserve such provisions, to submit a scheme to the Minister within six months of the passing of the Act (which received the Royal Assent on 30th July). Authorities which, not having adopted the Act of 1922, maintain a superannuation fund under a local Act are required to make schemes for modifying the same so as to secure that all their whole-time officers shall be superannuable and to facilitate interchange of staff with other authorities with preservation of accrued superannuation rights, etc., not later than 1st April, 1938 (s. 26 (1)). Schemes generally are subject to the provisions of s. 36 of the Act and are ineffective until approved by the Minister who is empowered to give his sanction to them with or without modification. The same section enables the Minister to grant an extension of the period for the submission of schemes, and the circular states that, while the Minister has no reason to think that this will be necessary in the majority of cases, he will be prepared to grant an extension in any case where he is satisfied that it is not practicable for the necessary action to be taken within the period specified by the Act.

Speed and Railway Accidents.

IT is only in comparatively rare instances that speed, so frequently the cause or concomitant factor of road accidents, is held responsible for railway accidents. The recent accident by derailment of a York to Lowestoft express, which occurred last February and involved the death of four railwaymen, the serious injury of another, and fifteen cases of minor injuries and shock to passengers, provides such an instance, and has led Colonel A. C. TRENCH, in the course of his report to the Ministry of Transport, to observe that the provision of speed indicators on locomotives which have to operate high speed trains is a matter which merits the serious consideration of the railway companies, and one likely to afford material assistance to drivers. It is urged that the speeding up, which has had to be adopted in recent years and is likely to continue, has modified the situation, owing to the increasing difficulty in judging correctly a moderate or low speed after an abrupt reduction from a much higher speed, while, if normal running speeds are increased, it is more important to observe and obey the restrictions imposed for safety reasons at special places. At the scene of the foregoing derailment there was an authorised limit of twenty miles an hour, and speed considerably in excess of that figure is held to have been the cause of the accident. The difficulties attendant upon the present conditions are well illustrated by the fact that the driver, who was held mainly responsible for the derailment, was a man of twenty years' experience and of very good record. In all the circumstances it is difficult to resist the soundness of the aforesaid recommendation. Observance of speed restrictions, whether local or applied to a particular class of vehicle is, of course, a matter of considerable importance in connection with road vehicles, and it may be recalled that the new Motor Vehicles (Construction and Use) Regulations, which came into force at the end of May, require, from 1st October, all vehicles, except invalid carriages and vehicles limited to a speed of twelve miles an hour, to carry an instrument (not necessarily a speedometer) to indicate within a ten per cent. margin of error when the vehicle is being driven at a speed greater than that allowed by law, or, where the vehicle is not subject to a speed limit by virtue of its class, at a speed over thirty miles an hour. The obligation to carry some kind of recording instrument is, of course, almost a necessary corollary of a speed limit, and it is interesting to note that railway practice on the Continent where a speed limit is the rule is, in this respect, considerably in advance of that in this country. Thus in France, where a legal maximum of about seventy-five miles an hour (lately increased on some lines to eighty-one) has been in existence for some eighty years, every express locomotive carries a speed indicator and recorder. Speedometers are also provided on the new fast services between England and Scotland, and it should perhaps be only a matter of time before a practice, which for the reasons stated by Colonel TRENCH seems obviously desirable, becomes general.

Land Registration: Official Searches.

THE attention of readers may be drawn to the form of application (No. 94) issued by the Land Registry under the Land Registration Rules, 1930 and 1936, for use in connection with official searches. The forms are published by H. M. Stationery Office at 1d. each, net, or 25 for 1s. 6d. net. Practice Leaflet for Solicitors, No. 2 (H. M. Stationery Office, price 1d. net), intimates that to get the full benefit of official searches on Form 94, it is essential that the vendor should immediately prior to the negotiations for sale send his land certificate to the registry to be made to correspond with the register or, where the certificate is not in his possession, obtain an up-to-date office copy of the register and plan, while the purchaser should satisfy himself as to the vendor's title by inspecting the land certificate or an office copy of the entries on the register before applying for the official search.

The Matrimonial Causes Act, 1937.

CONSIDERING the far-reaching importance, and profound significance of the Matrimonial Causes Act, 1937, it is a matter for congratulation to all concerned that the controversy which has been aroused during its progress to the Statute Book should have contained so little bitterness or venom. Now, however, that the Act is on the Statute Book, the time for controversy is passed and we must, without bias, consider its provisions in the light of the canons of statutory construction. Happily a little breathing space is allowed for practitioners and laymen to consider its meaning, as by s. 14 (2), the Act will not come into force until 1st January, 1938, and the Senior Registrar has directed that petitions under the new Act will not be accepted for filing before that date (see p. 656, *ante*).

THE PREAMBLE.

In case of ambiguity the court will look at the preamble to an Act to ascertain its meaning per A. L. Smith, L.J., in *Powell* v. *Kempton Park, etc.* [1897] 2 Q.B. 242, at pp. 272–3. It is, therefore, permissible to set out the preamble to this Act, which is as follows :—

> " Whereas it is expedient for the true support of marriage, the protection of children, the removal of hardship, the reduction of illicit unions and unseemly litigation, the relief of conscience among the clergy, and the restoration of due respect for the law, that the Acts relating to marriage and divorce be amended : "

Preambles in public Acts ceased to be fashionable about 1890 ; the above seems to afford a curious attempt to revive them.

THE THREE YEARS' LIMIT.

The first section consists principally of an amendment moved by Lord Maugham in the House of Lords, in which his lordship " had the assistance of many able people who are concerned with the actual practice of divorce and with the discharge of judicial duties in relation to matrimonial cases."—Official Report of Lords Debate for 7th July, 1937, col. 82. We can therefore approach the section with confidence that it will express in clear terms the meaning which Parliament desired. The section begins :—

> " 1.—(1) No petition for divorce shall be presented to the High Court unless at the date of the presentation of the petition three years have passed since the date of the marriage : "

The word " presented " presumably means filed, for the Matrimonial Causes Rules, 1924 (M.C.R.), r. 1, provides that proceedings under the Matrimonial Causes Acts or any of them shall be commenced by filing a petition.

It is a rule of the construction of statutes that, subject to clear words to the contrary, in cases where procedure is dealt with rather than substantive law, a retrospective operation may be assumed : *R.* v. *Leeds, etc., R. Co.* (1853), 18 Q.B. 343.

Section 1 (1) regulates procedure, so that although a would-be petitioner might have grounds for divorce before 1st January, 1938, or even before 30th July, 1937, when the Act was passed, yet if the petition has not been filed before January, it will not thereafter be accepted until three years from the marriage have elapsed. It behoves such a person therefore to be expeditious.

A curious position may arise if, for example, a wife is petitioning for judicial separation and the husband wishes to ask for a divorce. This relief would be prayed in the answer, which, while it is required to be filed and served on the adulterer, M.C.R., rr. 21 and 22 (B), it is not in terms a petition. It is submitted, with diffidence, that in the case of a marriage of under three years' duration, the court would extend the word " petition " to include an answer claiming relief which could have been granted by petition. Needless to say, the husband could use any ground which would support a divorce as a defence to the petition for judicial separation.

THE PROVISO.

The proviso to s. 1 (1) is :—

> " Provided that a judge of the High Court may, upon application being made to him in accordance with rules of the court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition, that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree *nisi*, do so subject to the condition that no application to make the decree absolute shall be made until after the expiration of three years from the date of the marriage, or may dismiss the petition, without prejudice to any petition which may be brought after the expiration of the said three years upon the same, or substantially the same, facts as those proved in support of the petition so dismissed."

No doubt rules of court will be made to deal with these applications and there is no need to anticipate what they will provide. The grounds upon which such applications will be able to be made need consideration.

What is meant by " exceptional hardship suffered by the petitioner and " exceptional depravity on the part of the respondent ? " It is submitted that " exceptional " in each case means exceptional in the experience of the court administering divorce, that is, exceptional among petitioners or respondents coming before the court, not exceptional as regards the ordinary marriage.

Although the speeches in either House of Parliament may not be used as a guide to the meaning of an enactment in a court of law, there is no reason against, and many reasons for, using the speeches of eminent law lords, who have expressed their views on the meaning of a Bill, as a guide to practitioners outside a court.

In the Official Report, referred to above, cols. 82–3, Lord Maugham says :—

> " I propose to cite one case where a husband, and another where a wife, has been injured. They were both poor people. The first one is this. A year after the marriage the wife went off with another man and told her husband that she would not in any circumstances return to him. The husband, who is left with a baby to look after, is a working man and has to go out all day. The other case is this. Within a year of marriage the husband told the wife brutally that he had no use whatever for her and went off with another woman. The wife, now aged twenty-five, gets no money from the husband and has to go out to work. She has a baby a few months old. In cases such as these —not to mention even more terrible cases where one of the parties has been guilty of the grossest possible forms of depravity—it would be a cruel hardship to say that the wife or the husband, as the case might be, must remain for a period of three . . . years . . . without the right to ask the court to exercise the discretion and give leave to present a petition for divorce."

Lord Atkin, *loc. cit.*, col. 88, says :—

> " My noble and learned friend [Lord Maugham] mentioned two other cases to-day which he thinks would come within this class of case which would be subject to the discretion of the judge—cases of exceptional hardship. I think when your lordships listened to him you recognised that those were normal cases of divorce—everyday cases of divorce among the working classes, cases in which divorce and relief ought to be given. There are some very, very bad cases. I heard of one only the other day, where a girl was married to a man who within two years took to drinking, brought women to their small house of two rooms, turned the wife and the baby out of the marital bed, turned her into the sitting room while he had relations with the woman

in their bed I suppose that was a bad case, and I suppose that any judge would exercise his discretion there. But that is not the ordinary case."

Although these noble and learned lords differed on the minimum requirements for bringing given cases within the proviso, their speeches are a guide to the nature of the exceptions necessary. The ordinary "hotel bill" type of case will obviously be insufficient.

MISREPRESENTATION OR CONCEALMENT.

It is not clear what is meant by the phrase "any misrepresentation or concealment of the nature of the case." Intentional misrepresentation of the facts is covered of course, but is an innocent misunderstanding sufficient? It is curious that the expression is "nature of the case" and not "facts of the case." One can imagine many circumstances in which, without any dishonesty, a petitioner might present a case on the application, which would turn out at the trial—especially in a defended case—to be much exaggerated. It is submitted that such would come within the words "misrepresentation . . . of the nature of the case."

It would seem that once a petitioner gets leave to present a petition within the three years, even if the court subsequently finds misrepresentation or concealment, the decree absolute will be accelerated by nine months to a year, if the petition is not dismissed, because he or she can make the decree absolute immediately after the end of the three years.

In determining an application, the court must have regard to the interests of the children and the possibility of reconciliation (s. 1 (2)).

GROUNDS FOR DIVORCE.

Section 2 substitutes a new s. 176 for that of the principal Act—the Supreme Court of Judicature (Consolidation) Act 1925—and the new s. 176 establishes four grounds for divorce in the case where either spouse is petitioning, three of which are new, and three grounds for divorce, where the wife is petitioning, none of which are new. These are, where either spouse is petitioning:—

(a) Adultery;

(b) Desertion without cause for at least three years immediately preceding the presentation of the petition;

(c) Cruelty;

(d) The respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition;"

and, where the wife is petitioner, rape, sodomy and bestiality.

(a) There is nothing new in adultery as a ground of divorce, but this trifling change is effected that after this year it will no longer be necessary, where the wife is petitioning upon the ground of adultery, in the absence of cruelty, for the adultery to have taken place since 17th July, 1923.

(b) This applies to divorce, substituting three years for two, one of the grounds for a judicial separation under s. 185 (1) of the principal Act. This ground dates from s. 16 of the Matrimonial Causes Act, 1857.

(c) It is submitted that "cruelty" means legal cruelty of the kind which would have entitled a spouse to a divorce *à mensâ et thoro* in the Ecclesiastical Courts before 1857, see per Lord Davey, in *Russell* v. *R.* [1897] A.C. 395, at p. 467. This type of cruelty is a ground for judicial separation under s. 185 of the principal Act, and prior to the passing of the Matrimonial Causes Act, 1923, was with adultery a ground for a wife's divorce. It includes constructive cruelty—for which see *Kelly* v. *K.* (1869), L.R. 2 P. & D. 31 and 59—and has been judicially considered in a large number of reported cases.

(d) This is entirely new. Insanity has been a ground for nullity proceedings either in accordance with *Turner* v. *Meyers*, falsely calling herself Turner (1808), 1 Hag. Con. 414, that is where the insane person does not at the time of the marriage ceremony understand its nature, or under the Marriage of Lunatics Act, 1811, where at such time a party to the marriage is a lunatic "so found." In the latter case, indeed, the marriage is void, with or without nullity proceedings. This ground is for the benefit of the insane spouse, the new provision for the benefit of the sane spouse. The time of the unsoundness of mind is different: it is five years before petition under the new provision; under the old law, it is at the time of the marriage.

The respondent in a case under (d) can, under r. 75 of the M.C.R., be represented by his or her committee or a guardian *ad litem*. A petitioner may presumably apply for a guardian *ad litem* if the respondent does not.

"Incurably of unsound mind" must be a question of fact. It will hardly be possible to succeed without medical evidence, and probably it will be seldom possible to get an alienist to say that a patient is incurable. No doubt five years' treatment, coupled with the absence of a prospect of cure, will be sufficient.

(*To be continued.*)

The Mortgage of a Business and of Business Premises.

(*Continued from p.* 693.)

IV.

Patents and Designs.

A legal mortgage of a patent or registered design requires to be made by deed, and to be registered under the provisions of the Patents and Designs Acts, 1907–1932; though it has been held that an equitable mortgage under hand is capable of being protected on the register (see *In re Casey's Patent* [1892] 1 Ch. 104). The intending mortgagee should search the register prior to completion; and, if desired, the registrar will, on request, arrange to give him notice of any proposed registered dealing up to the actual date of such completion.

When the mortgagor is one of several joint tenants, it is doubtful whether he possesses the power to mortgage his interest without the consent of the others; and it must be remembered that patents are granted to co-applicants as joint tenants. But it has been held by the House of Lords that one tenant in common may mortgage his share without any reference to his co-tenants (*Steers* v. *Rogers* [1893] A.C. 232). The mortgage may be so framed as to create a charge upon one particular invention of those protected by the patent, or may be limited to user in any particular locality.

The numerous clauses necessary in a mortgage of a patent (for which reference should be made to the standard works) can usually be incorporated in the mortgage of the business itself, and thus the stamp duty chargeable on a collateral security be saved. A charge upon any patents which the mortgagor may obtain by grant or purchase in respect of similar inventions to that mortgaged has been held valid (*Printing, etc. Co.* v. *Sampson*, L.R. 19 Eq. 462).

Where the mortgagor has only a licence to use the patent or sell the patented article in his business, the question will arise as to whether the licence is assignable by way of mortgage. It will not be so assignable without the consent of the licensor unless it was originally granted to the licensee and his assigns or power to assign is otherwise implied.

Where the licensor's consent is not necessary, the mortgagor should be required to covenant that the licence is valid and subsisting and that its provisions have been observed and performed, while the mortgagee must covenant to observe and perform them in the future. Similar provisions as to the grant of sub-licences to those used in the case of a mortgage of the patent itself should be added. Where, on the other hand, the licensor's consent is required, it is preferable for him to be

made a party in order to give qualified covenants as to the validity of the patent and the licence, in addition to those of the mortgagor, in consideration of the mortgagees covenanting to perform the conditions in the licence, such latter covenant to be discharged on his procuring a similar covenant from his assignees.

Copyright.

Questions of copyright may arise in connection with the mortgage of many classes of business besides the publishing trade, e.g., in regard to dress designs, film rights or photographs.

The law is now codified and consolidated in the Copyright Act, 1911, which deals with copyright (now including dramatisation and film rights) in literary, dramatic, musical and artistic works, the latter comprising works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs.

In regard to all these various works (except photographs) the author is the first owner of the copyright, unless he was in the employment of another person under a contract of service and the work was produced in the course of his employment, in which case the copyright belongs to the employer. Where a photograph is ordered and paid for, the copyright belongs to the sitter and the negative to the photographer; but it has been held that the copyright in a photographic portrait taken free of charge belongs to the photographer (*Boucas* v. *Cooke* [1903] 2 K.B. 227). Copyright may subsist in the illustrations in a trade catalogue, even if there is none in the letterpress (*Maple & Co.* v. *Junior Army and Navy Stores*, 21 C.D. 369).

Where the mortgagor is the first owner of the copyright in a work other than a collective work, the mortgage can only operate to transfer the copyright for his life and twenty-five years afterwards. The charge may under the Act be expressly limited either as to interest or locality; the latter provision being of great practical value in regard to rights of reproduction or film rights in a particular country. A mortgage by legal assignment would probably confer on the mortgagee the right to sue infringers in his own name, but a mortgage of the copyright in future works not yet composed, though effective in equity (*Performing Rights Society, Ltd.* v. *London Theatre of Varieties, Ltd.* [1924] A.C.1), would not do so, and it is therefore advisable in all cases to insert a power of attorney for the mortgagee to sue in the mortgagor's name. The benefit of any subsisting licences would pass without express mention, but it is preferable to refer to them. Royalties are capable of separate legal assignment as choses in action. The mortgagor of a literary work does not derogate from his grant by selling the stock which he already has in hand, although he must not reprint the work (*Taylor* v. *Pillow*, L.R. 7 Eq. 418).

One tenant in common of copyright can mortgage his share without the consent of the others, but the mortgagee cannot without such consent do anything, such as the grant of a licence for the public performance of a play, which would amount to an infringement if done by a stranger (*Powell* v. *Head*, 12 C.D. 686).

Trade Fixtures.

In the absence of a contrary intention, all fixtures, including all essential parts of fixed machinery, will become subject to the charge; and the same is true of those attached by the mortgagor subsequently to the mortgage. The rule applies equally to freehold and leasehold premises, and to legal and equitable mortgages (*Meux* v. *Jacobs*, L.R. 7 H.L. 481).

It is clear from the decision of the House of Lords in the case of *Reynolds* v. *Ashby* [1904] A.C. 466, and from other cases, that the principle applies equally when the mortgagor has purchased or hired the fixtures under an agreement whereby the property in them is to remain in the vendor or lessor until all instalments of the price have been paid, if it is essential to their use that they should be permanently annexed to the land and they are so annexed; though it has since been held that a hire-purchase agreement in the common form is valid as against an equitable mortgagee; and it may also be so as against a legal mortgagee with notice (*In re Allen & Sons* [1907] 1 Ch. 575; *In re Morrison, Ltd.* [1914] 1 Ch. 51).

Fixtures acquired under a hiring agreement for a short term with an option to purchase which is not exercised have, on the other hand, been held not to pass to a legal mortgagee (*Lyon & Co.* v. *London City & Midland Bank* (1903), 2 K.B. 135).

The rule may be excluded by a contrary intention, express or implied, such as an enumeration of certain fixtures only, as in *Hare* v. *Horton*, 5 B. & Ad. 715; or a custom known to both mortgagor and mortgagee that certain plant is always treated locally as chattels, as in *Trappes* v. *Harter*, 2 C. & M. 153.

It must be remembered further that, although during the subsistence of the mortgage the mortgagor cannot remove ordinary fixtures, he has in general, according to the better authority, implied power while in possession to permit trade fixtures to be fixed and unfixed on the premises, provided they are unfixed before the mortgagee takes possession, though, when that happens, the right to unfix them ceases (see *Gough* v. *Wood* [1894] 1 Q.B. 713; *Ellis* v. *Glover* [1908] 1 K.B. 388). But it would appear to be doubtful whether the right of removal extends to fixtures attached by the mortgagor himself, or applies to fixtures *in situ* when the mortgage is executed (*In re Rogerstone Brick and Tile Co. Ltd.* [1919] 1 Ch. 110).

The result of the above cases makes it desirable for the mortgagee in cases where trade fixtures constitute a substantial part of the security to require the insertion of a clause (the validity of which as against both mortgagor and owner was decided in *Ellis* v. *Glover*, *supra*) negativing the mortgagor's right to remove them without the written consent of the mortgagee. Where the security is equitable only, such a clause would, however, be ineffectual as against the equitable interest of a person hiring out the fixtures under a hire-purchase agreement in the ordinary form, though good as against the mortgagor himself; and it appears to be unwise for even a legal mortgagee to inquire too closely into the title to trade fixtures which he finds on the premises, since he might be affected with notice of the existence of such an agreement.

Care must also be taken in drafting a mortgage of premises and fixtures that the mortgage does not come within the provisions of the Bills of Sale Acts.

The effect of ss. 4 and 5 of the Act of 1878 and the decisions thereon appears to be as follows:—

(1) A charge upon fixtures which deals with them as chattels apart from the premises to which they are attached requires to be registered as a bill of sale. But this does not apply to the exceptions from "trade machinery" contained in s. 5, i.e., fixed motive powers and their appurtenances, fixed-power machinery, and steam, gas and water pipes in any workshop or factory (see *Topham* v. *Greenside Firebrick Co.*, 27 C.D. 281).

(2) A mortgage of ordinary fixtures together with any interest in the premises to which they are annexed is not a bill of sale, even if power is given to sever them from the land, or they are assigned by separate words.

(3) "Trade machinery" in any factory or workshop is subject to special rules. If it passes as part of the land, even if expressly described in a schedule, the mortgage will not require to be registered; but if express power is given to sever it, or chattels are included in the same deed, or even, it seems, if it be assigned by separate words, the deed will constitute a bill of sale. The statutory power of sale, though it applies to fixtures, does not

authorise the mortgagee to sell them apart from the land. Authority for the above statements will be found in *In re Yates*, 38 C.D. 112; *Small* v. *National Provincial Bank* [1894] 1 Ch. 686; *In re Brooke* [1894] 2 Ch. 600; and *Johns* v. *Ware* [1899] 1 Ch. 359. If a schedule is used, care must be taken to see that all the fixtures intended to be charged are included; otherwise those which are omitted may be held to be impliedly excluded from the mortgage.

Company Law and Practice.

Share-pushing.—II.

LAST week I dealt with one or two incidental points referred to by the Committee when discussing the methods by which share-pushers provided themselves with their stock-in-trade, and I now intend to deal with that part of the report which considers the present company law. At the beginning of part II of the report, entitled "The Present Law and its Administration," the Committee divide the law applicable to the offences comprised in their terms of reference into three parts: one, the general criminal law, with which we are not here concerned; two, s. 356 of the Companies Act, 1929, and three, various sections of that Act dealing with the formation of limited liability companies, the issue of shares therein and the information which must be supplied to the public in connection with such issue.

First, the report deals with sub-s. (1) of s. 356, which provides that "It shall not be lawful for any person to go from house to house offering shares for subscription or purchase to the public or any member of the public," and then goes on to exclude an office used for business purposes from the expression "house." As is pointed out, the phrase "house to house" is derived from the report of the Departmental Committee on Company Law Amendment, 1925–26 (C.M.D. 2657). In that part of the report which dealt with share-hawking the "individuals" who are concerned in passing off worthless shares were divided into two classes: "(1) Those who go from house to house offering for subscription or sale shares, etc., generally in the form of certificates to bearer; (2) those who circularise the public with offers to sell shares, etc." The incorporation of this phrase "house to house" in the Companies Act, 1929, is regarded as unfortunate by the Share-pushing Committee; they do not suggest, and it would seem difficult to do so, any advantage in a prohibition so phrased, which, no doubt, at the time of the report accurately applied to the activities which the sub-section was designed to prevent, over a prohibition of going to *any* house for the purposes mentioned. A result of the phrase being used is that though there have been a number of complaints of contraventions of the sub-section, only one conviction has been obtained under it. The one person who has been convicted had adopted the expedient of travelling by car and calling at a house in one town and then at another house in quite a different place, in the hope, which proved vain, that such a course of conduct would not constitute going from house to house. Having referred to this case the report goes on to state that "there is also the difficulty to be surmounted of proving that the visits at different houses were paid by the same person." One would not have thought that this difficulty would have been at all serious, or, if it is, then it will apparently be extremely unlikely that a person convicted under any new provision prohibiting going to any house for these purposes will be convicted of more than one offence, however many houses he has in fact visited.

The report points out that the phrase "to the public or any member of the public" lacks precise significance as those who have had to consider whether or not an invitation to subscribe for shares among a limited number of persons must or need not comply with the requirements of a prospectus. Finally, with regard to this sub-section the Committee indicate that it should not be assumed that all people who have offices are of sufficient intelligence or experience to withstand the blandishments of share-pushers, and the Committee considers that, though an exception is necessary in the case of offices where dealing in stocks and shares is carried on as a business, no such exception is necessary or desirable in the case of offices where business of a totally different kind is carried on, and which are, in practice, naturally the only offices which share-pushers would visit.

Sub-section (2) of this section provides as follows: "Subject as hereinafter provided in this subsection, it shall not be lawful to make an offer in writing to any member of the public (not being a person whose ordinary business it is to buy or sell shares, whether as principal or agent) of any shares for purchase, unless the offer is accompanied by a statement in writing (which must be signed by the person making the offer and dated) containing such particulars as are required by this section to be included therein and otherwise complying with the requirements of this section, or in the case of shares in a company incorporated outside Great Britain either by such a statement as aforesaid or by such a prospectus as complies with this part of the Act"; and the sub-section then goes on to exclude the application of the sub-section in certain cases. The meaning of this section is by no means clear, but the interpretation tentatively suggested by the learned editors of Lord Wrenbury's book is this: the sub-section has no application to the issue of "sale" prospectuses, a matter already dealt with by ss. 35, 38, 354 and 355 of the Act. It applies only to written offers of shares for purchase (as distinct from a prospectus which usually merely invites offers for the purchase of shares) made to individual members of the public in such manner or in such circumstances that the written offers are not prospectuses, or, if they are prospectuses, are not "issued" within the meaning of the Act, i.e., prospectuses are dealt with by the sections above referred to, and where they are accompanied by application forms, as they always are, they must comply with the provisions of the 4th Sched. This section now under consideration applies to private offers of shares for purchase, where application forms would be inapplicable, and the offer must be accompanied by the statement giving the information required by sub-s. (4) of this section, which is not so extensive as that required to be given by a prospectus. This interpretation certainly seems a reasonable one and one which was almost certainly intended by the draughtsman of the Act. If, however, some of the Committee's recommendations are acted upon, this section will have to be altered to a certain extent, and this difficulty, if it be a difficulty, may at the same time be cleared up.

The provisos referred to above preventing the application of the sub-section are as follows: (*a*) where a quotation or leave to deal in the shares offered has been granted by any registered stock exchange in Great Britain; and with respect to this proviso the Committee points out that the Act does not define the expression "any recognised stock exchange." At the same time they have apparently no great difficulty in deciding that the existing organisations of stock and share brokers and dealers consist of the London Stock Exchange, the Associated Stock Exchanges, comprising twenty-two independent provincial stock exchanges, the Provincial Brokers Stock Exchange, the Oldham Stock Exchange and the Mincing Lane Stock Exchange. They regard all of these as stock exchanges, except possibly the Provincial Brokers Stock Exchange, but they add that they see no reason why it should not be regarded as one.

Proviso (*b*) of this sub-section excludes the application of the sub-section, i.e., the necessity for the prescribed statement in writing accompanying offers of shares for sale when the shares offered have been allotted or been the subject of an agreement to allot with a view to their being offered for sale

to the public. This proviso the Committee regard as obscure, but they adopt the view expressed in the note in Lord Wrenbury's book relating to it, which gives as an explanation that the case is assumed to be covered by either s. 38 or s. 354, which entitle the public in such circumstances to the information a prospectus would give. The note goes on to point out that the shares might be *bona fide* allotted with a view to a public offer for sale, and that the offer might subsequently be abandoned or fail, in which case: "*Semble*, the fact of the contemplated public offer falling through or being a failure would not prevent the shares not purchased or the public offer being within the present exemption if subsequently offered privately for purchase to members of the public." In spite of the fact that the proviso does not expressly refer to ss. 38 and 354, the Committee adopt this view of the operation of this section.

The remaining part of the report dealing with s. 356 and especially the observations of the Committee on proviso (*c*) to this sub-section I intend to deal with in my article next week, together with a few other passages of the report of interest in relation to company law.

A Conveyancer's Diary.

[Contributed.]

Secret Trusts.

Circumstances sometimes arise in which a testator wishes to make a disposition of part of his estate in favour of objects whose names he does not wish to appear on the face of the will. In carrying out the testator's instructions the draftsman must therefore have resort to the doctrine of secret trusts, and since the rules governing this doctrine are very precise, he must pick his course carefully among them.

A secret trust arises when a gift is made by the will to A upon the understanding that he will apply the gift in a particular way. The trust does not arise under the will itself, but is grounded upon the fact that it binds the conscience of the legatee. Where that is so, equity will enforce the trust against the legatee and the legacy.

Such is the general principle, but in the course of centuries the courts have evolved exact rules as to its application.

In the first place, the terms of the secret trust must be both definite and legal. We need not pause to consider this rule, which is common, after all, to all trusts. If it is infringed the trust will fail.

Now, the gift in the will may take one of several forms; it may either be "to A," or it may be "to A upon trust," or "to A upon the trusts declared in any memorandum I may leave," or "to A upon the trusts of a memorandum prepared by me and communicated to him." These are the main classes of form, but others are, of course, possible.

If the gift is "to A," the position is this: as Lord Warrington of Clyffe said in *Blackwell* v. *Blackwell* [1929] A.C. 318, at p. 341: "It has long been settled that if a gift be made to a person or persons in terms absolutely, but in fact upon a trust communicated to the legatee and accepted by him, the legatee would be bound to give effect to the trust. . . It is also settled that in such cases it is immaterial whether the trust is communicated and accepted before or after the execution of the will, inasmuch as in the latter case the testator, if it had not been accepted, might have revoked the will." Of course, in those cases the trust is proved by parol evidence. And it is obvious that if no trust can be proved, the legatee takes absolutely. It is important to notice that it does not matter when the testator communicates the trust in such a case, and consequently the trust may be varied between the dates of the will and of the death. Herein, as we shall see, the position differs from that where the gift is on the face of it upon trust, and a testator dealing with his estate in this way has more flexibility. But, all the same, the method is not one to be recommended, since there is nothing in the will to put anyone on inquiry—no one reading the will would suppose that A did not take absolutely—and the difficulties of discovering the trust and of proving it, unless the legatee admits it, may well be insuperable.

The position is more complex where there is a trust upon the face of the will. Where that is so, and for one reason or another the secret trust fails or cannot be proved, the legatee does not take absolutely, but holds on trust for the residuary legatees or next of kin, as the case may be.

In giving effect to trusts of this kind the courts have anxiously guarded themselves against allowing breaches of the Wills Act. "A testator cannot reserve to himself a power of making future unwitnessed dispositions merely by naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust never communicated to him in the testator's lifetime" (per Viscount Sumner in *Blackwell* v. *Blackwell*, at p. 339). Consequently if the gift is "to A upon such trusts as may be declared in any memorandum I may leave" the secret trusts will always fail, and the residuary legatees or next of kin will take; such a memorandum would be of no avail, even if it existed at the date of the will, since the will itself contains words wide enough to admit in its stead a later memorandum, which would really be an unexecuted codicil. Nor is the trust good because the trustee knows of the terms of the will and acquiesces in the prospect of holding upon the trusts declared in any memorandum left by the testator, since such trusts would suffer from the additional vice of being indefinite. This point is further brought out in the recent case of *In re Keen* [1937] Ch. 236.

In *Blackwell* v. *Blackwell*, *supra*, on the other hand, a somewhat similar gift was held to create an enforceable secret trust. The material difference was, however, that the terms of the secret trust were communicated to the trustees prior to, or contemporaneously with, the execution of the codicil whereby the legacy was given them. Incidentally, a memorandum was prepared more or less at the same time setting out the terms. Such a memorandum only affects the issue of proof: it is valuable, of course, as such. But that the trusts accepted by the trustees were rendered into writing does not affect the question of the validity of those trusts, if proved. If trusts are created outside the will, the question is whether they bind the conscience of the legatee, and writing is not material to that point. However, for the sake of simplifying proof, the trusts should normally be put into writing. Conversely, it appears that if they are put into writing the written document may be handed to the legatee in a sealed envelope. In such a case, if the trustees agree contemporaneously with the execution of the will to act upon the instructions which they will find on breaking the seal, the trust will be good. "To take a parallel, a ship which sails under sealed orders is sailing under orders, though the exact terms are not ascertained by the captain till later" (per Lord Wright, M.R., in *Re Keen*, at p. 242). It is to be observed, however, that this point was merely one upon which the Master of the Rolls expressed his disagreement with the court below, while affirming its decision upon other grounds. It does not appear to have been the direct subject of a reported decision, though there is an earlier *dictum* to the same effect, and should therefore not be relied on unless it is absolutely necessary.

In short, then, the proper way of making a secret trust is to give the legacy "to A upon the trusts which I have already communicated to him." A should be informed of them before the will is executed, and they should be embodied in a memorandum of even date with the will, which had better be signed both by the testator and by A. If this is done the trust (unless it is illegal or too vague) will be good, and its terms will be easy to prove. But such a trust cannot be varied

by a subsequent memorandum. If it is desired to vary the trust, a codicil should be executed revoking the first legacy and giving another, and the same procedure with the memorandum and communication to the trustee should be gone through.

As appears above, secret trusts are often enforceable in other cases, but the rules are very technical and no other mode of creation is so reliable as the one indicated. Consequently the legal advisers of the testator, starting with a clean sheet, should not unnecessarily depart from the safe course.

Landlord and Tenant Notebook.

House Agent's Authority to Let.

Most house agents spend, I suppose, more time negotiating leases than arranging sales; yet most of the decisions illustrating the limits of their authority appear to have arisen out of alleged contracts for the sale of freehold property. These can be applied, up to a point, to agreements for leases and tenancy agreements, though regard may have to be paid to the differences in the circumstances. Thus, on the one hand, a tenancy or lease is necessarily a temporary affair; on the other hand, the bargain may contain a vast number of terms, compared to those of a contract for sale. However, on the question of the ordinary house agent's authority to bind his principal by signing an open contract, it has been held over and over again in relation to sales that he has no such power, the leading case perhaps being *Hamer* v. *Sharp* (1874), L.R. 19 Eq. 108; but it was not till the present century that the effectiveness of an agreement for a lease evidenced by an agent's letter was in issue.

This was in *Thuman* v. *Best* (1907), 97 L.T. 239, when an intending tenant sued for specific performance and damages, though he abandoned the former claim in the course of the proceedings. He had originally made an offer, through a firm of estate agents, of £190 a year for a Mayfair flat. This was duly passed on, and the defendant told the agents he would accept £195. The plaintiff, advised by telephone, agreed, if the figure included porter and the lighting of the stairs and all that was usual in a West End lease. The defendant then told the agents that he agreed provided certain formalities were complied with. Next day the agents wrote to the plaintiff stating that the defendant had accepted and asking for references "as a matter of form." Later in the same day they let the flat to someone else at £200 a year.

Apart from the question of the agents' authority, and also apart from the fact that no special damage was proved, it was clear that no case could be made, for the parties were never *ad idem*. But for present purposes what is important is that Parker, J., held that an estate agent as such had no general authority to enter into a contract.

The judgment also contains some useful observations on the demarcation of the functions of estate agents and of solicitors in the negotiation of a lease. The agents' business, his lordship said, was to arrange the main provisions of the lease, such as the rent and the term for which the property was to be let; and it was not their business, even if they were capable of doing so, to negotiate and arrange the subordinate clauses in the lease: that would more properly be the business of the solicitors of the parties.

The words "as such" are of course of vital importance; an estate agent may be expressly authorised to conclude a contract; but for an example one has to go back to *Slack* v. *Crewe* (1860), 2 F. & F. 59. The plaintiff agreed verbally with the defendant's house agent to take a house for three years. The defendant himself gave the plaintiff permission to instal some gas fittings. The agent let him into possession (before the date agreed for commencement) and the defendant sent a written tenancy agreement for signature. The plaintiff refused to sign it on the ground that it differed from what had been agreed, the subject-matter of the alleged variation being repairs. Thereupon the defendant forcibly ejected him. It was left to the jury to say whether the defendant had actually authorised the agent to let the plaintiff into possession or sanctioned his being let into possession, without or before agreeing to the terms embodied in the written words, in either of which cases they were to find for the plaintiff. They did. It will be observed that the direction covered the possibility of ratification.

That an intending landlord impliedly authorises a house agent to describe the property is hardly open to question. Indeed, there appears to be no authority directly in point; but in many of the cases which illustrate and lay down the law as to misrepresentation, it will be found that the misleading statements alleged to have been made were imputed to estate agents acting for landlords, and that the defence of *ultra vires* has not been raised. But if judicial authority be required, a passage in the judgment of Bacon, V.-C., in *Mullens* v. *Miller* (1882), 22 Ch. D. 194, is in point. The action arose out of the sale of leasehold property, and it may also be mentioned that it does not appear that the agent was actually a house agent by profession; but the following remarks, made by way of illustration, are pertinent: "A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value . . . It would be very dangerous . . . to limit the authority of an agent in the way in which the argument before me proposed to limit it, namely, that the duty . . . simply was to go out into the world and find a man likely to buy."

The above passage rather assumes what was at one time considered a moot point if the agent's misrepresentations were made innocently as far as he was concerned; this was due to the decision in *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358, when an agent negotiating the letting of the plaintiff's house told the defendant, in answer to a question, that there was no objection to it. The agent was not aware, but the plaintiff was aware, that the adjoining house was used for immoral purposes. The plaintiff was held entitled to enforce the agreement; but, as has since been made clear by the judgment of Lord St. Leonards in *National Exchange Co. of Glasgow* v. *Drew* (1855), 2 Macq. 103, the result might have been the reverse if the defendant, instead of pleading fraud, had contended that the contract was voidable for misrepresentation.

Our County Court Letter.

AUTHORITY OF COMPANY'S SOLICITOR.

In the recent case of *Hunt and Wife* v. *Scarborough South Cliff Golf Club Ltd.*, at Scarborough County Court, the claim was for £49 5s. for wages in lieu of notice, and damages for breach of contract. The plaintiffs' case was that they were interviewed by a committee and told that they were engaged as steward and stewardess. After arranging to move in, the plaintiffs received a solicitor's letter, informing them that the board of directors could not confirm the appointment, as a younger man with more golf club experience was required. This was the first intimation of the need for confirmation, and the plaintiffs had lost a seasonal situation elsewhere. It transpired during the evidence for the defence, that the directors did not know about the case, and that the solicitor (who was on the committee) had briefed counsel on his own responsibility. It was submitted that it fell within the duties of a solicitor to a company to make arrangements to defend a case, but His Honour Judge Sir Reginald Mitchell Banks, K.C., held that a solicitor was not entitled to institute or

defend a legal action without the authority of a resolution of the directors. A resolution of the directors was admittedly necessary to engage a steward, but counsel had been briefed without such authority. In effect there was no appearance by the defendant company, and judgment was given for the plaintiffs, with costs.

At a subsequent court an application for a new trial was made on behalf of the defendant company. The Official Receiver had intimated that the amount for which the plaintiff had recovered judgment should not be paid to him, as he was an undischarged bankrupt. It was explained, on behalf of the plaintiff, that he did not oppose the application for a new trial, but the Official Receiver's claim to the money was not admitted. Under the Bankruptcy Act, 1914, s. 51 (2), the Official Receiver was only entitled to such amount as the court might think just. His Honour Judge Sir Reginald Mitchell Banks, K.C., observed that judgment was recovered by the plaintiffs jointly, and part of the amount was for personal services, i.e., it was capitalised wages. The bankruptcy point would be considered later, but in the meantime an order for a new trial was made on condition that £16 (the amount already in court) was paid to the plaintiff, and that £33 5s. (the balance of the judgment) was paid into court. An order was also made for the joinder of four members of the golf club committee as defendants.

INFANT'S LIABILITY FOR RENT.

In a recent case at Walsall County Court (*Tolley* v. *Jarvis*) the claim was for £3 8s. for arrears of rent of a house. The plaintiff's case was that in November, 1935, the defendant looked over the house, stating that she was going to be married at Christmas. The house was therefore let to her at 12s. a week until the furniture was moved in, and thereafter at 16s. a week. The defendant paid some rent at 12s. and had the keys from the 7th November, 1935, until the 14th February, 1936. The defendant's mother then said the house would not be wanted, as the defendant was not getting married, but the outstanding rent had not been paid. The defendant's case was that at the time of the alleged tenancy, and at the hearing, she was an infant in law; alternatively that she never rented the house and had paid what was due under the alleged tenancy. His Honour Judge Tebbs upheld the plea of infancy, and gave judgment for the defendant, with costs. It is to be noted that, if a lease be set aside on the ground of the infancy of the lessee, the lessor cannot recover for use and occupation. See *Lempriere* v. *Lange* (1879), 12 C.D. 675.

Obituary.

SIR JAMES BELL.

Sir James Bell, C.V.O., Town Clerk of the City of London for thirty-three years, died at his home at Windsor on Wednesday, 1st September, at the age of seventy-one. He was educated at Preston Grammar School and University College School, London, and was admitted a solicitor in 1888. He became Assistant Town Clerk and Solicitor to the Corporation of Birmingham in 1891, and from 1894 to 1902 he was Town Clerk of Leicester. He was also Clerk and Solicitor to the Derwent Valley Water Board from 1899 to 1902. He was only thirty-six when, in 1902, he was elected Town Clerk of the City of London. He received the honour of knighthood in 1911, and in 1920 he was made a C.V.O. Sir James retired from the office of Town Clerk in 1935.

MR. F. H. STAPLEY.

Mr. Frederick Henry Stapley, solicitor, a partner in the firm of Messrs. Stapley & Hurst, of Eastbourne, died at Eastbourne on Monday, 30th August. Mr. Stapley was admitted a solicitor in 1888.

Reviews.

Automatic Machines and the Law. By GABRIEL COHEN, of Gray's Inn, Barrister-at-Law, and I. L. MALTZ, Solicitor of the Supreme Court. 1937. Crown 8vo. pp. (with Index) 111. London: Jordan & Sons, Ltd. 5s. net.

The authors inform us that this book "can be no more than a guide, and readers are advised to consult their solicitors for guidance and advice on their own particular problems." Nevertheless, it is bound to be of practical use and value to the automatic machine trade, dealing as it does with the law governing the sale and operation of automatic machines of all kinds in a concise and clear manner. The Appendix of Statutes contains the relevant extracts from various enactments, and it is humorously significant that in the index the word "bankruptcy" follows "baccarat"!

The Mercantile Law of Scotland. By ALLAN M'NEIL, M.A., S.S.C., and J. A. LILLIE, K.C., LL.B., Advocate, and of the Middle Temple, Barrister-at-Law. Third Edition. 1937. Demy 8vo. pp. xxii and (with Index) 380. Edinburgh: W. Green & Son, Limited. 10s. 6d. net.

A new and considerably enlarged edition of this excellent and admirably arranged work, with all the recent decisions duly incorporated in the appropriate sections, is very welcome, particularly, of course, to Scottish practitioners and students to whom it makes its primary appeal, but English lawyers may also find it to their advantage to consult it for the Scottish decisions on points where the law of the two countries is essentially the same, such as the subjects of the sale of goods, bills of exchange, companies and carriage of goods. English lawyers may also note with interest certain special rules of Scots law such as that known as summary diligence, which was devised some centuries ago to facilitate the speedy recovery of debts which have been constituted by bills of exchange—a procedure uniting simplicity with promptitude. Thus, where a bill has been dishonoured on presentation for payment, it may be "noted" and a protest following thereon may be registered in the court books; and an extract of the protest is the practical equivalent of a judgment against the debtor for the amount of the bill upon which execution may follow. Besides being carefully brought up to date by taking note of the numerous changes in the law effected by statute and decision since the previous edition was published in 1929, a very useful feature has been added which is likely to be welcomed by students who have to take the subject of mercantile law for secretarial and other examinations, namely, a glossary of Latin words and phrases with references to the pages in the text on which each of them is used. We can cordially commend this new edition.

Books Received.

Selected Cases on Commercial Contracts. By A. CECIL CAPORN, B.A., LL.B., of the Middle Temple, Barrister-at-Law. 1937. Demy 8vo. pp. xviii and (with Index) 395. London: Stevens & Sons, Ltd. 12s. 6d. net.

The Juridical Review. Vol. XLIX, No. 3. September, 1937. Edinburgh: W. Green & Son, Ltd. 5s. net.

Medico-Legal Aspects of the Ruxton Case. By JOHN GLAISTER, M.D., D.Sc., Barrister-at-Law, and JAMES COUPER BRASH, M.A., M.D., F.R.C.S. Ed. 1937. Crown 4to. pp. xvi and (with Index) 284. Illustrated. Edinburgh: E. & S. Livingstone. 21s. net.

The Journal of Comparative Legislation and International Law. Third series, Vol. XIX, Part III. August, 1937. Edited by F. M. GOADBY, D.C.L. London: Society of Comparative Legislation. Annual subscription, One guinea.

To-day and Yesterday.

LEGAL CALENDAR.

30 AUGUST.—In 1849 and 1850 all America was morbidly excited over the arrest of Professor John Webster, an eminent scientist of Boston University, for the murder of a Dr. Parkman, to whom he owed a considerable sum of money. After a violent quarrel between the men, Parkman had vanished, and some time after portions of his dismembered body were found ingeniously hidden in a vault beneath the professor's laboratory. Conviction was almost inevitable and the execution took place on the 30th August, 1850, even the roofs of houses overlooking the gaol being at a premium for the accommodation of curious sightseers.

31 AUGUST.—On the 31st August, 1835, "honest Louis Perrin," as O'Connell called him, was appointed a Justice of the King's Bench in Ireland. Of French Huguenot descent, he was the son of a scholarly man who had attained some celebrity as a teacher of French and author of text-books. Though odd in manner and an ungraceful speaker, he was an ingenious lawyer, and during his twenty-five years' service on the Bench came to be regarded as one of the most able and upright judges.

1 SEPTEMBER.—Few men are so faithful to their native places as Lawrence Carter, of Leicester, whose father had carried through a scheme to supply the town with water and had also represented it in Parliament. Young Lawrence, embracing a legal career, obtained his first appointment on the 1st September, 1697, when at the age of twenty-five he was unanimously elected Recorder by the City fathers. Three times he represented Leicester in Parliament and even after he became a Baron of the Exchequer he maintained his house in Redcross Street. When he died he was buried in the Church of St. Mary de Castro.

2 SEPTEMBER.—When the great Lord Clarendon was deprived of the Chancellorship in August, 1667, all England was full of speculation as to the cause. On the 2nd September, Pepys records that a friend told him "many things not fit to be spoken and yet not anything of his being unfaithful to the King; but *instar omnium* he told me that while he was so great at the Council board and in the administration of matters there was no room for anybody to propose any remedy to what was amiss or to compass anything, though never so good, for the kingdom unless approved of by the Chancellor."

3 SEPTEMBER. On the 3rd September, 1711, Lord Keeper Harcourt was raised to the peerage as Baron Harcourt of Stanton-Harcourt.

4 SEPTEMBER.—On the 4th September, 1685, Chief Justice Jeffries, on his terrible visitation to the West Country after the crushing of Monmouth's rebellion, opened the Assizes at Dorchester. Early in the morning he and the other judges went in state to St. Mary's Church, and it is said that at an allusion in the sermon to the attribute of mercy he was observed to laugh. Charging the Grand Jury in the scarlet-hung Shire Hall, he made it clear that he had come to "breathe death like a destroying angel and to sanguine his very ermines in blood."

5 SEPTEMBER.—There were over three hundred prisoners awaiting trial and, on the 5th September, true bills were found against thirty persons for high treason. Though Jeffreys warned them that if they were tried and found guilty, they should have but little time to live and advised them to plead guilty if they expected any favour, they took their chance. All but one were convicted. In a week the terrible business was over. Of the prisoners there were seventy-four executed and two hundred sentenced to transportation, which meant slavery in the West Indies. Then Jeffreys moved towards Exeter.

THE WEEK'S PERSONALITY.

As Lord Harcourt really was a good Chancellor, it may not be altogether amiss to quote some of the high-flown eulogies of his patent of peerage, making due allowance for the spacious phraseology of the age. After praising his lineage the patent proceeds: "Descended from such noble ancestors, he suffered indeed in his paternal inheritance, which was diminished by the fury of the Civil Wars, but their glory acquired by military virtue descended upon him unimpaired and this he, having assumed the gown, increased by the force of his genius and his eloquence. So various are his powers that many doubt whether he most excells in pleading causes at the Bar or in debating the affairs of the nation in the senate, but all agree that he is the most eloquent of lawyers and the most learned of orators. . . . Him whom, endowed with such high qualities, all clients have wished to defend their causes, not without reason we preferred to be our Attorney-General and finding other employments unsuitable to his extraordinary capacity we have advanced to the highest pitch of forensic dignity and made him our supreme Judge of Equity. Still his conduct is more and more meritorious in proportion to his elevation."

SENTENCED TO SERMONS.

A judge in Florida has made a brilliant contribution to penal science by sentencing a reckless driver to attend thirteen Sunday sermons, and to appear in Court every Monday to give a summary of each. In default of thus working out his salvation in the pew, the alternative was ninety days in the cells. At that computation one might compound twenty years' penal servitude by about one thousand and fifty days of true devotion. But before the English Bench embrace this innovation, they should reflect on the possible effect on the prisoner's nervous system of such a succession of penal homilies. There was once a murder case in which the great Hawkins, then at the Bar, tried to convince Maule, J., of the mental instability of the prisoner by calling the vicar of his parish to prove that just before the crime he had abandoned a thirty-four-year habit of church attendance. From this zealous man the judge extracted complacent details of his ministrations, two sermons every Sunday, with an occasional homily of the Church, and a Tuesday service with discourse. For thirty-four years the prisoner had never missed one and then inexplicably he became a Sabbath-breaker. All this the judge carefully noted down.

CAUSE AND EFFECT.

When the vicar had told his story, the judge was seen to be making calculations. Then looking up he addressed him thus: "You have given yourself, sir, a very excellent character and doubtless by your long service in the village have richly deserved it. The result, however, of your indefatigable exertions so far as this unhappy man is concerned comes to this—" (here he turned to counsel with a look of wonder). "This gentleman has written with his own pen and preached or read with his own voice to this unhappy prisoner about one hundred and four Sunday sermons or discourses, with an occasional homily every year. These, added to the week-day services, make exactly one hundred and fifty-six sermons, discourses or homilies for the year. These again, being continued over a space comprising no less than thirty-four years, give us a grand total of five thousand three hundred and four sermons, discourses or homilies during this unhappy man's life. Five thousand three hundred and four by the same person, however respectable and beloved as a pastor he might be, was what few of us could have gone through, unless we were endowed with as much strength of mind as powers of endurance. Did it ever strike you," he asked the witness, "when you talked of this unhappy being suddenly leaving your ministrations, that after thirty-four years he might want a little change? Would not that, instead of showing that he was insane, prove that he was a very sensible man, and perfectly sane although he murdered his wife?"

POINTS IN PRACTICE.

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Mortgagee and Demolition.

Q. 3481. A, on the 15th April, 1925, executed a mortgage by conveying a cottage to B to secure £75 with interest at six per cent. A occupied the cottage. In 1936, A was served by the local urban council with a notice that the cottage was condemned, and A left the cottage to live in a house rented to him by the urban council. When A left the cottage he owed the principal sum of £75 with arrears of interest. To-day, B (the mortgagee) has been served with a notice, headed "Housing Acts, 1925 to 1936," that unless the cottage is demolished within fourteen days from the service of the notice (7th June, 1937) the council will proceed to demolish the same, and take steps to recover the costs of demolition from the mortgagee. A is not able to pay the £75 and interest so the money is lost. B (the mortgagee) contends that he is not liable to demolish the cottage because he is not the owner thereof. He never entered into possession of it, and relies on s. 21 of the Housing Act, 1930. Is B liable to pay the Council the costs of the demolition?

A. The Housing Act, 1936, s. 188 (1), defines "owner" as a person other than a mortgagee not in possession. B is therefore not the owner, and is entitled to rely upon s. 13 of the above Act (which has superseded s. 21 of the Housing Act, 1930) whereby the expenses are recoverable from A. B is not liable for the costs of the demolition.

The Land Drainage Act, 1930.

Q. 3482. (1) How far must a county council have evidence in support of their "opinion" under s. 35 (2) of the above Act before a notice is served? (2) Is it the duty of a county council to obtain the necessary evidence in such a case, or is it the duty of the complainant? (3) Where evidence is insufficient or unavailable should a county council be advised to let the complainant take proceedings under s. 57 of the above Act?

A. (1) Evidence should be obtained in the form of a report from a person qualified to investigate the conditions. He need not be an independent expert, and the county surveyor or one of his staff could doubtless advise the local authority. (2) There is no duty upon the county council to obtain the necessary evidence. The sub-section is permissive, not imperative. (3) If the evidence is insufficient or unavailable, the county council cannot form the "opinion" under s. 35 (2) which is a necessary preliminary to exercising their functions thereunder. The complainant should, therefore, be left to proceed under s. 57.

Personal Representatives—Assent—Continuing Liability—Indemnity—Leaseholds—T. A., 1925, s. 26.

Q. 3483. A, by his will, bequeathed a leasehold dwelling-house to B for the residue of the term created by the lease and subject to the payment of the ground rent reserved in such lease. A has died since the 1st January, 1926, and it is now desired to prepare a vesting assent of the property in favour of B. In preparing the vesting assent is it necessary or advisable to have a covenant by B with A's personal representatives to pay the rent and to observe the covenants contained in the lease and to indemnify? Also, what is the position of A's personal representatives if no such covenant is contained in the vesting assent?

A. It is in our opinion both necessary and advisable to insert such a covenant. The covenant would not be implied under s. 77, sub-s. (1) (*c*) of L.P.A., 1925, because the assent would not be a conveyance for value, and, although the personal representatives would be entitled to, or could qualify for, the protection afforded by T. A., 1925, s. 26, as amended by L. P. (Amend.) A., 1926, Sched., this section operates without prejudice to the right of the lessor to follow the assets of the deceased. The covenant should extend not only to indemnify the personal representatives, but also the estate of the deceased A. As to the position of the personal representatives in the absence of such a covenant our subscribers are referred to T. A., 1925, s. 26. This section is too long to set out *in extenso* in this reply. Briefly, however, if the personal representatives before assenting have met or provided for all definite present or future claims under the lease they will cease to be personally liable. In the case of future claims only fixed and ascertained sums agreed to be expended by the lessee are referred to.

Set-off of Assigned Debt.

Q. 3484. A owes B a certain sum for goods supplied. A is the managing director of a company to whom B also owes a certain sum for goods supplied. B enters into a deed of arrangement with his creditors, and the trustee assigns the goodwill of the business and the book debts to a purchaser C. C is now applying to A for the amount due in respect of his debt. A contemplates having the debt owing by B to his company assigned to him. Will A then be able to set-off this debt against C's claim?

A. A will be entitled to set-off the company's original debt against C's claim. See *Bennett* v. *White* [1910] 2 K.B. 643. No distinction arises by reason of the fact that C is also an assignee, as this circumstance strengthens A's claim to set-off also as an assignee. If A were to claim against C, C would doubtless plead a set-off, and the principle of mutuality entitles A to do the same.

Incapacity from Rheumatism.

Q. 3485. X was employed as a furnace worker. During a gale towards the end of February, portion of the roof covering the premises where X worked was blown away, leaving a large opening which was not covered in (even temporarily) for several days. Before the repair was effected, X, as a result of the combined exposure to the heat of the furnace and the snow and rain falling through the hole in the roof, contracted a rheumatic complaint and was totally incapacitated for three or four months. What right of action (if any) has X against his employers: (*a*) Under the Workmen's Compensation Act (liability is denied by the employers); (*b*) under the Employers' Liability Act (the injury would seem to have been caused by a defect in the ways or works used in the business of the employers); (*c*) at common law? Reference to authorities will oblige.

A. (*a*) The rheumatic complaint was an injury by accident under the Workmen's Compensation Act, 1925, s. 1, see *Drylie* v. *Allon Coal Co.* (1913), 6 B.W.C.C. 398; *Coyle or Brown* v. *Watson* [1915] A.C. 1. (*b*) and (*c*) As the roof was blown off during a gale there is no evidence of negligence by the employer, nor of any defect in the ways or works used in the business. If the omission to repair the roof was

so prolonged as to constitute a breach of the Factory and Workshop Act, 1901, a cause of action might arise for breach of statutory duty. This is a question of degree, and it would be difficult to prove that the repairs were delayed for an unreasonable period. The only right of action appears to be under the Workmen's Compensation Act.

Administrators' Costs.

Q. 3486. We are acting for the administrators of the estate of an intestate whose estate becomes divisible amongst brothers and sisters and issue of deceased brothers, such issue being under the age of twenty-one years. Two of the beneficiaries, being a brother of full age, and a niece, who is an infant and a child of a deceased brother, have for many years resided abroad, and the deceased's family in England lost all trace of them. In order to find these missing beneficiaries, the administrators were obliged to expend a substantial sum of money in fees for advertising and for solicitors abroad who were engaged in tracing them, and eventually both beneficiaries have been found. We shall be pleased if you will advise us: (1) whether in your opinion the costs incurred in tracing the missing beneficiaries can be charged against their shares; and (2) if the answer to the above is in the negative, whether in view of the fact that one of the missing beneficiaries is an infant, but who will attain majority in about a year's time, any arrangement can be made between the beneficiaries whereby all or part of the special costs can be charged against the shares of the beneficiaries who have had to be found. It is possible that the latter will be quite willing to come to some arrangement amicably, but the question of infancy appears to be an awkward one.

A. The administrators of an estate are in the same position, essentially, as the owner of the estate himself, and they have greater powers than an ordinary agent. For example, they may pay debts barred by the statute of limitations. They must act reasonably, and must deal with the estate in the same manner as a prudent business man. For all this, they are bound to distribute the estate so far as they reasonably can, in accordance with the law. If, then, the administrators of an estate know of the existence of possible claimants, they must take reasonable steps to ascertain the whereabouts of those claimants, and failure to do so would render them liable personally. Exactly what are reasonable steps is a question of fact to be decided on the circumstances of each particular case, and the court might hold that a simple advertisement, without the employment of solicitors or other agents, is all that the administrators could reasonably be expected to do. In administering the estate, the administrators are entitled to employ solicitors, accountants and others to assist them, and may charge the estate with the cost of their services, provided the charges are reasonable and the employment was necessary for the proper winding up of the estate. These are the broad principles, and on the basis of these principles it would seem that the answers to the questions should be as follows, subject to the comment that the answers are given on the assumption that the administrators acted reasonably in the administration of an estate of which they were aware from the outset that there were beneficiaries who were missing: (*a*) The answer is in the negative. The administrators, knowing that these beneficiaries were in existence, would have acted unreasonably in distributing the estate without taking proper steps to locate them. (*b*) Since one of the beneficiaries is an infant, the administrators would not be safe in charging her proportion with any greater part of the "special" costs than her rateable proportion, nor will any agreement by her be binding. So far as the adult beneficiary is concerned, he can, of course, bind himself. This is, obviously, a case for compromise, and the administrators are advised to negotiate a settlement on the lines that the infant beneficiary's share is only debited with the proper proportion of the costs applicable to her share.

Notes of Cases.

Court of Appeal.

In re Northcliffe's Settlements.

Greene, M.R., Romer and MacKinnon, L.JJ.
28th July, 1937.

SETTLEMENT—TRUSTEES—TENANT FOR LIFE—POWER OF ADVANCEMENT FOR HIS BENEFIT—BANKING ACCOUNT OF TENANT FOR LIFE OVERDRAWN—PROPOSAL TO APPOINT BANK TRUSTEE.

Appeal from a decision of Bennett, J.

A settlement contained a power of advancement whereby the trustees might in their discretion make advances out of capital to the tenant for life who had a protected life interest. His banking account was considerably overdrawn. This summons taken out by two of the three trustees asked for the appointment of the tenant for life's bankers as additional trustees, in the case of this and certain other settlements. Bennett, J., decided (*inter alia*) that the appointment should not be made. The applicants appealed.

GREENE, M.R., in the course of his judgment, said that there was nothing to suggest that the judge was laying down, or considered himself bound by, some principle applicable to the appointment of banks as trustees. His lordship did not wish to be understood as holding that such a principle existed, or as laying down any principle, but would decide the case on its particular facts. The objection made to the appointment was that in view of the trustees' power of advancement it would be undesirable for the bank to become a trustee with the certainty of becoming sole trustee when the tenant for life had an overdraft with them. His lordship could not see that in refusing to make the appointment Bennett, J., considered himself to be bound by some principle. After referring to the facts of the case, his lordship said that there was sufficient to support the learned judge's exercise of his discretion and the appeal should be dismissed.

ROMER, L.J., agreeing, said that no principle prevented a bank from being appointed a trustee of a settlement merely because one or all of the beneficiaries were customers.

MACKINNON, L.J., agreed.

COUNSEL: *Roxburgh*, K.C., and *A. L. Ellis*; *Morton*, K.C., and *J. L. Stone*; *J. H. Sparrow*.

SOLICITORS: *Ellis, Peirs & Co.*; *Russell & Arnholz*.

[Reported by FRANCIS H. COWPER, Esq., Barrister-at-Law.]

High Court—Chancery Division.

In re Pigs Marketing Board, 1936, Bonus Scheme; Pigs Marketing Board and Another *v.* G. Bailey & Sons Ltd. and Others.

Crossman, J. 22nd July, 1937.

TRADING REGULATIONS—MARKETING OF PIGS AND BACON—PRODUCERS' CONTRACTS—PIGS "CONTRACTED TO BE DELIVERED"—"LOWEST SCORAGE" OF PIGS DELIVERED—CALCULATION OF BONUS.

The bulk of the delivery of pigs to the bacon trade being made at the end of the year, the Pigs Marketing Board and the Bacon Marketing Board, in order to secure a more even distribution and in particular to ensure a certain percentage of deliveries in January, February, March and April, devised a bonus scheme which was incorporated in the contracts to be entered into by producers. Sums were collected to form a bonus fund, one-third of which was to be applicable to a "special bonus." With regard to the calculation of this special bonus it was provided that "in reckoning the lowest scorage delivered, no regard shall be had to pigs delivered in a month other than the month in which they were contracted to be delivered." Some producers delivered the number

of pigs stipulated in the four months, delivering some pigs each month, but in one of the four months delivered more than were allotted to them in their contracts for that month. The question arose whether the excess of pigs so delivered should be carried forward or ignored altogether in calculating the special bonus.

CROSSMAN, J., in giving judgment, said that the question depended on the words "contracted to be delivered." Taking the scheme as a whole, pigs which were delivered in one of the four months under a contract in excess of the number provided for should be treated as pigs contracted to be delivered by the producer in that month.

COUNSEL: *Daynes*, K.C., and *W. Waite*; *R. Hankey*; *Hubert Hull*; *C. Burt*.

SOLICITORS: *Ellis & Fairbairn*.

[Reported by FRANCIS H. COWPER, Esq., Barrister-at-Law.]

High Court—King's Bench Division.

Bennett, Oswald & Worskett *v.* Bennet (Inspector of Taxes).

Lawrence, J. 5th May, 1937.

REVENUE—INCOME TAX—PROPERTY BOUGHT FOR DEVELOPMENT FOR FIXED SUM PLUS OBLIGATION TO PAY FURTHER MINIMUM SUM ON RE-SALE—TRUE PURCHASE PRICE.

Appeal by case stated from a decision of the Commissioners of the General Purposes of Income Tax.

One, S. A. Worskett, owned property which subsequently became valuable as building land. Being an old man, he decided that it would be unwise to make over the whole property to his son, H. F. Worskett, for development, and arranged with one Bennett and one Oswald, that the property should be conveyed to them jointly with H. F. Worskett. The conveyance stated that the purchase price was £15,000, of which £12,000 were supplied by Bennett and £3,000 by Oswald. As a condition of that arrangement, Bennett and Oswald at the same time undertook to pay H. F. Worskett a minimum sum of £25,000, as and when they re-sold the whole of the property. Until 1932, the land was developed through various builders by the three owners. On the death of Oswald in 1932, his executors formed a partnership with Bennett and H. F. Worskett to continue developing the land. That partnership, the present appellants, based the accounts of their business on a statement of the cost price of the property as £40,000, being the £15,000 supplied by Bennett and Oswald, and the balance of £25,000 secured to H. F. Worskett. The partnership were assessed for the six years 1929–30 to 1935–36 on the basis that the cost price of the land was £15,000, and they appealed against that assessment, contending that the conveyance of the land was not conclusive and that the Commissioners must look to the whole transaction of which it formed only a part, the true agreement being that Oswald and Bennett paid £15,000, the balance of £25,000 being secured to H. F. Worskett. The Crown contended that £15,000 was payable and in fact paid for the land. The Commissioners held that the £25,000 was not part of the cost price of the land, and the partners now appealed.

LAWRENCE, J., said that the case was one of some difficulty, but that he had come to the conclusion that £15,000 was not the true cost of the property, because it appeared to have been a term of the arrangement, and an obligation owed by Bennett and Oswald to S. A. Worskett, that they should pay H. F. Worskett a minimum price of £25,000 when they resold the property. That was a valuable obligation which, in his (his lordship's) opinion, constituted a part of the cost of the property. Oswald and Bennett got the property, not for £15,000, but for £15,000 plus that obligation. That figure of £25,000, being a minimum figure, ought to be taken at its face value as a part of the cost price, and the true figure at which to open the account ought to be £40,000. The appeal would be allowed.

COUNSEL: *Roland Burrows*, K.C., and *J. A. Bell*, for the appellants; *The Solicitor-General* (Sir Terence O'Connor, K.C.) and *R. P. Hills*, for the Crown.

SOLICITORS: *J. R. Cort Bathurst*; *Solicitor of Inland Revenue*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Wyndham *v.* Jackson.

Goddard, J. 8th July, 1937.

PRACTICE AND PROCEDURE—MATTER REFERRED TO MASTER—ADJUDICATION WITH PARTIES' CONSENT ON DISPUTE NOT COVERED BY REFERENCE—WHETHER EQUIVALENT TO AWARD BY ARBITRATOR.

Action tried by Goddard, J.

The plaintiff and the defendant having become interested in a theatrical production, and certain disputes having arisen, the plaintiff issued a writ in the Chancery Division claiming an account of the profits and payment of the money due to her. Farwell, J., made an order that an account be taken, and the matter went before a Master. A dispute arose on a point not covered by Farwell, J's. order, and the Master dealt with it at the request of the parties, eventually giving a certificate that £91 14s. 4d. was due to the plaintiff. The defendant then took out a summons to discharge or vary the Master's certificate. The matter having come before Farwell, J., he declined to consider the summons on the ground that the Master had no power to accede to the request of counsel to consider matters not strictly within the ambit of the original order. He stated that he regarded the certificate as a nullity, and, although the plaintiff was anxious that he should deal with the summons, he dismissed it and gave the plaintiff the costs. A summons was taken out on behalf of the plaintiff to enforce the Master's certificate, and asking for an order for payment, notwithstanding that Farwell, J., had held that it was a nullity. The matter eventually came before Luxmoore, J., who, on hearing of Farwell, J.'s order, dismissed the summons and ordered the plaintiff to pay the costs. It was stated before Goddard, J., that Luxmoore, J., had expressed the view that the Master's certificate could be regarded as an award; and that, on that, this action had been brought, his lordship being asked to regard the Master's certificate as the award of an arbitrator and to give judgment in favour of the plaintiff. The defendant contended that the determination of the dispute made by the Master was not binding on the parties.

GODDARD, J., said that the costs must have grown out of all proportion to the trivial sum involved. He had to determine whether, on the authorities, Luxmore, J.'s *obiter dictum* was right. It was argued for the plaintiff that a series of cases decided that when the court, either of its own motion, assented to by the parties, or on the request of the parties, departed from the ordinary course of procedure, the resulting determination or order could not be disregarded as a judgment or order in an action because the court was acting outside its proper sphere or powers. Among the cases relied on by the plaintiff were *Craig* v. *Duffy*, 8 Bell, 308; *Dudgeon* v. *Thompson*, 1 Macq., 714; *Harrison* v. *Wright*, 11 M. & W. 816; and *Burgess* v. *Morton* [1896] A.C. 136. The ground of the decisions was that the parties, by asking the judge to decide something in a manner outside the ordinary course of law, must be taken to have agreed to be bound by his decision, not as a judge, but as an arbitrator. The convenience and practical justice established by that line of authority was obvious. The judge had done what the parties had asked him to do. It was surely right that that result should not be regarded as a complete nullity. It might well be that the parties at the time had no idea that what they were doing would prevent the unsuccessful party from carrying the case to appeal. He (his lordship) could find no trace in the authorities that intention in that respect had anything

to do with the matter. What was of importance was that the parties deliberately and consciously asked for the determination by a particular person of a particular matter, and got it. There would be judgment for the plaintiff for £91 11s. 4d. What, if that judgment stood, would be the consequence to the Chancery action, or how the costs were to be dealt with, were not matters with which he (his lordship) could deal.

COUNSEL: *C. Gallop*, for the plaintiff; *J. Busse*, for the defendant,

SOLICITORS: *Lazarus, Son, and L. A. Hart; Samuel Tonkin, Booth & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Rex *v.* **Wisbech, Isle of Ely, Licensing Justices—** *Ex parte* **Payne.**

Lord Hewart, C.J., du Parcq and Hilbery, JJ.
26th July, 1937.

LICENSING—EXTENSION OF HOURS—"SPECIAL REQUIREMENTS"—LICENSING ACT, 1921 (11 & 12 GEO. V, c. 42), s. 1.

Rule *nisi* for *certiorari* granted at the instance of one, J. W. Payne, calling on the licensing justices of the County of the Isle of Ely Petty Sessional Division of Wisbech to show cause why an order made by them under s. 1 of the Licensing Act, 1921, should not be quashed.

The order directed that during the months of June, July and August, 1937, s. 1 (1) of the Act should have effect as though "eight and a half" were substituted for "eight" and "half past ten at night" were substituted for "ten at night" (thereby extending the permitted hours by half an hour). The ground of the rule was that the order was made without jurisdiction because there was no evidence before the justices of any special requirements of the district within the meaning of the section on which the justices could exercise their discretion. It was submitted on behalf of 303 objectors, for whom Payne appeared, that there was no evidence of any facts which could in law constitute special requirements. It was contended in support of the rule that there was evidence on which the justices could act; that licensing justices were not confined to acting on sworn evidence, but could also act on the speeches of those who argued before them and on their own knowledge of the district, and that there was no decision as to the meaning of "special requirements," but that "special." must be equivalent to "local" requirements, not "unique" requirements.

LORD HEWART, C.J., said that it was quite obvious that the purpose of s. 1 of the Act of 1921 was to call in and rely on the local justices, who were to be satisfied that the special requirements of the district rendered a change desirable. That was an essential part of the legislation. There was a general rule, to be adjusted or corrected by the special requirements of the district. It was said that here there was no evidence of special requirements, but what better evidence could there be? The chairman of the justices, in his affidavit, had stated that the justices had found as a matter of fact that the livelihood of the majority of the inhabitants of our division was obtained by fruit growing and agriculture, and that, during the summer months in particular, the said persons were kept working late in the fields, often as late as ten p.m., in order to supply fresh fruit and vegetables for the markets on the following morning. They had further found by a majority that if the licensed houses in the said division were closed at ten p.m. unreasonable inconvenience during certain summer months was caused to those unable or unwilling to leave their work until that hour. It was true that the secretary of the Licensed Victuallers' Association had said in cross-examination: "I am asking because it is more comfortable for the trade," but that answer might well have been due to the form of the question. He (his lordship) saw no discrepancy between that which was comfortable for the trade and that which met the special requirements of the district. The rule must be discharged.

DU PARCQ and HILBERY, JJ., agreed.

COUNSEL: *C. Humphreys*, showing cause; *R. P. Croom-Johnson*, K.C., and *G. Gardiner*, in support; *B. A. Harwood* held a watching brief for a dissenting justice.

SOLICITORS: *Godden, Holme and Ward*, agents for *Mellows and Son*, Peterborough; *Metcalfe, Copeman and Pettefar; William P. Webb.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Attorney-General *v.* **London Casino Ltd.**

Finlay, J. 26th and 27th July, 1937.

REVENUE—ENTERTAINMENTS DUTY—CABARET SHOW AT RESTAURANT—FIXED CHARGE MADE FOR MEALS, DANCING AND REVUE—WHETHER DUTY PAYABLE—FINANCE (NEW DUTIES) ACT, 1916 (6 & 7 Geo. 5, c. 11).

English information.

By the information the Attorney-General alleged that the objects of London Casino Ltd. were to carry on business as theatre, music-hall, cinema, concert-hall, restaurant, café, and hotel proprietors and managers; that at all material times the company had advertised that a revue in two acts and twenty-six scenes, described as a "complete revue" and a "full stage show," would be presented at the Casino at dinner and at supper; that the prices for the meals (15s. 6d.) were advertised to include "dinner or supper, dancing, and revue"; that the revues were entertainments within the meaning of the Finance (New Duties) Act, 1916, and that the charges made by the company were payments made, *inter alia*, for admission to those entertainments; that, if the charges represented payment for privileges besides admission to an entertainment, it appeared to the Commissioners of Customs and Excise that a certain proportion of the charges represented payment for admission to entertainments in respect of which entertainments duty was payable; and that entertainments duty was payable by the company on the minimum charges or on the dutiable proportions thereof. It was contended for the company that the business carried on by it was that of a restaurant; that revues at the London Casino were advertised as one of the attractions offered to induce persons to dine or sup at the premises; that neither the charges made by them nor any part thereof were payments made for admission to an entertainment; that the Finance (New Duties) Act, 1916, did not apply to the present case; and that when s. 1 of the Act said that entertainments duty should "be charged, levied and paid on all payments for admission to any entertainment" as defined by the Act, and entertainment was defined as including "any exhibition, performance, amusement, game or sport to which persons are admitted for payment," the legislature contemplated the ordinary case of a theatre or a football match where persons were admitted to see a spectacle.

FINLAY, J., said that the scheme of the Casino was that food and drink of a high quality should be provided with dancing and a band, but that also there should be as an attraction an ambitious and high-class revue. That constituted the special characteristics of the place. People visited the London Casino and paid 15s. 6d. or more for a meal substantially because, in addition to their dinner and the privilege of dancing, they would be able to see an extremely interesting and lively show. Rather a liberal construction had been given by the courts to the words "payment for admission" in the Act of 1916. Difficulty had been caused by the observations of the majority of the judges in *J. Lyons & Co.* v. *Fox* [1919] 1 K.B. 11, but those *dicta* must be read with reference to the facts of the case then before the court. Those facts were widely different from those of the present matter, the music and songs in *J. Lyons & Co.* v. *Fox, supra*, being merely incidental to the meals. The result was that the Crown was entitled to succeed.

COUNSEL: *The Attorney-General* (Sir Donald Somervell, K.C.), *Valentine Holmes*, and *H. P. J. Milmo*, in support of the informations; *Norman Birkett*, K.C., and *Michael Rowe*, for London Casino Ltd.

SOLICITORS: *Solicitor of Customs and Excise; Kenneth Brown, Baker, Baker.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Court of Criminal Appeal.

R. *v.* Barker and Others.

Lord Hewart, C.J., du Parcq and Goddard, JJ.
28th July, 1937.

CRIMINAL LAW—APPEAL AGAINST SENTENCE—PRINCIPLES ON WHICH COURT MAY DECIDE TO REDUCE.

Applications for leave to appeal against sentence.

The appellants were convicted of riotous assembly in connection with certain disputes at a colliery, and were sentenced by Singleton, J., to imprisonment with hard labour for periods varying from four months to two years. The scenes of violence arose out of the fact that, while the colliery was the scene of a strike or lock-out of members of one trade union, members of another union continued to work at the colliery. It was contended for the applicants that many of them were only connected with certain of the incidents by the operation of the law relating to rioting; that the judge should have severed the incidents at the colliery entrance from those later in the village; that the men who had taken part in the rush at the pit head after months of intolerable provocation were very different from people who threw bricks into dwelling-houses or through the windows of the miners' institute; that the sentences were excessive; that all the applicants were persons of good character, and that it was impossible to believe that they would ever have found themselves within the scope of the criminal law if they had not had to pass through many months of acute industrial aggravation; that some of the sentences might be greater than that passed on a person guilty of motor manslaughter or of obtaining £10,000 by fraud; and that such sentences must be regarded as totally disproportionate in a case in which there was no threat of civil war or other serious element.

GODDARD, J., giving the judgment of the court, said that the court did not revise a sentence merely because its individual members might have passed a lighter sentence if they had been trying the case. The court only interfered where a sentence was not justified by law; where it could be shown, by the length or severity of the sentence, or by some other matter, that the court below had erred on some question of principle; or where matters had been taken into account which should not have been taken into account. Not one of those elements existed in the present case. When passing sentence, Singleton, J., carefully discriminated between the applicants. The riot was one of great gravity and must have struck terror into the hearts of all those not actually engaged in it. It possessed the unfortunate feature that women and children were terrorized by attacks on the houses in which they were. It was impossible to say that any of the sentences were in the least degree excessive, and the applications must be refused.

COUNSEL: *D. N. Pritt, K.C.*, and *Nigel Robinson*, for the applicants; *T. N. Winning* for the Crown.

SOLICITORS: *H. W. Guthrie & Co.*, agents for *H. O. O. Pepper*, Worksop; *Director of Public Prosecutions.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

[For Table of Cases previously reported in current volume see page xv of Advertisements.]

Mr. Lionel Henry Peacock, retired solicitor, of Elstree, left £120,287, with net personalty £106,575.

Rules and Orders.

THE SUMMARY JURISDICTION RULES, 1937.
DATED JULY 31, 1937.

1. These Rules may be cited as the Summary Jurisdiction Rules, 1937.

2. These Rules shall come into operation on the first day of October, 1937.

3. Statements of allegations furnished under section 4 of the Summary Procedure (Domestic Proceedings) Act, 1937,* to a court of summary jurisdiction by a probation officer or other person, who has been requested by the court or a justice of the peace to attempt to effect a conciliation between the parties to proceedings to which the said section applies, shall be made in the form in the Schedule hereto and such statements may contain, in addition to the allegations made by the said parties, information as to such other matters relating to the proceedings and to the parties thereto as are set out in the said form.

Dated the 31st day of July, 1937.

Hailsham, C.

SCHEDULE.

FORM.

Statements of Allegations. (*S.P.* (*D.P.*) *Act*, 1937, *s.* 4.)

1. Name and age—
   (*a*) of applicant. .....
   (*b*) of defendant. .....
2. Address—
   (*a*) of applicant. .....
   (*b*) of defendant. .....
3. Date of the marriage. .....
4. Age and sex of any children under 16 years of age and where living. .....
5. Allegations made by the applicant. .....
6. Defendant's answer to applicant's allegations and any counter allegations made by the defendant. .....
7. Applicant's answer to defendant's counter allegations. .....
8. Names and addresses of persons furnished as being able to give material evidence by—
   (*a*) the applicant. .....
   (*b*) the defendant. .....

* 1 Edw. 8 & 1 Geo. 6. c. 58.

Long Vacation, 1937.

HIGH COURT OF JUSTICE.

NOTICE.

During the remainder of the Vacation, all applications "which may require to be immediately or promptly heard," are to be made to the Hon. Mr. Justice SIMONDS.

COURT BUSINESS.—The Hon. Mr. Justice SIMONDS will until further notice, sit in The Lord Chancellor's Court, Royal Courts of Justice, at 11 o'clock on Wednesdays, commencing on Wednesday, 8th September for the purpose of hearing such applications of the above nature, as, according to the practice in the Chancery Division, are usually heard in Court.

PAPERS FOR USE IN COURT.—CHANCERY DIVISION.—The following Papers for the Vacation Judge are required to be left with the Cause Clerk in attendance at the Chancery Registrar's Office, Room 136, Royal Courts of Justice, before 1 o'clock, two days previous to the day on which the application to the Judge is intended to be made:—

1.—Counsel's certificate of urgency or note of special leave granted by the Judge.

2.—Two copies of notice of motion, one bearing a 5s. impressed stamp.

3.—Two copies of writ and two copies of pleadings (if any).

4.—Office copy affidavits in support, and also affidavits in answer (if any).

No Case will be placed in the Judge's Paper unless leave has been previously obtained or a Certificate of Counsel that the Case requires to be immediately or promptly heard, and stating concisely the reasons, is left with the papers.

N.B.—Solicitors are requested when the application has been disposed of, to apply at once to the Judge's Clerk in Court for the return of their papers.

URGENT MATTERS WHEN THE JUDGE IS NOT PRESENT IN COURT OR CHAMBERS.—Application may be made *in any case of urgency* to the Judge personally (if necessary), or by post or rail, prepaid, accompanied by the brief of Counsel, office copies of the affidavits in support of the application, and also by a Minute, on a separate sheet of paper, signed by Counsel, of the order he may consider the applicant entitled to, and also an envelope, sufficiently stamped, capable of receiving the papers, addressed as follows :—" Chancery Official Letter : To the Registrar in Vacation, Chancery Registrar's Office, Royal Courts of Justice, London, W.C.2."

The address of the Vacation Judge can be obtained on application at Room 136, Royal Courts of Justice.

CHANCERY CHAMBER BUSINESS.—The Chancery Chambers will be open for Vacation business on Tuesday, Wednesday, Thursday and Friday in each week, from 10 to 2 o'clock.

KING'S BENCH CHAMBER BUSINESS.—The Hon. Mr. Justice SIMONDS will sit for the disposal of King's Bench Business in King's Bench Judge's Chambers at half-past 10 on Tuesday in each week.

PROBATE AND DIVORCE.—Summonses will be heard by the Registrar at the Principal Probate Registry, Somerset House, every day during the Vacation at 11.15 (Saturdays excepted).

Motions will be heard by a Registrar on Wednesdays, the 8th and 22nd September, and the 6th October, at the Principal Probate Registry at 12.15.

Decrees will be made absolute on each Wednesday during the remainder of the Vacation.

All papers for making Decrees absolute are to be left at the Contentious Department, Somerset House, on the preceding Thursday, or before 2 o'clock on the preceding Friday. Papers for Motions may be lodged at any time before 2 o'clock on the preceding Friday.

The Offices of the Probate and Divorce Registries will be opened at 10 a.m. and closed at 4 p.m. except Saturdays, when the Offices will be opened at 10 a.m. and closed at 1 p.m.

CHANCERY REGISTRAR'S OFFICE,
Royal Courts of Justice,
Room 136.

Legal Notes and News.

Honours and Appointments.

The Dominions Office announces that the King has been pleased to approve the appointment of Mr. LEWIS EDWARD EMERSON, K.C., to be a Member of the Commission of Government of Newfoundland, in succession to Mr. W. R. Howley, K.C., who has been appointed to the post of Registrar of the Supreme Court of Newfoundland, with effect from 1st October next.

The Minister of Health, The Right Hon. Sir Kingsley Wood, M.P., has appointed Mr. W. R. FRAZER, O.B.E., to be Assistant Secretary (Acting) of the Ministry of Health.

Mr. CYRIL E. C. R. PLATTEN, Assistant Solicitor at Uxbridge, has been appointed Assistant Solicitor to the Southwark Borough Council. Mr. Platten was admitted a solicitor in 1935.

Notes.

On and after Monday, the 6th September, 1937, the Head Office of the Equity & Law Life Assurance Society will be at No. 20, Lincoln's Inn Fields, W.C.2. Telephone : Holborn 7612.

The amalgamation of the Scottish Estate Factors' Society and the Faculty of Surveyors of Scotland with the Chartered Surveyors' Institution has been ratified by the Privy Council as from 29th July, 1937.

A notice of the death on 27th August of Mr. Charles Howitt, of Putney, " for fifty-two years the faithful friend of and assistant to the partners of Messrs. Gard, Lyell and Co., of 47, Gresham Street, E.C.2," appeared in *The Times* last Monday.

A broadcast address on the provisions of the Matrimonial Causes Act, which will come into force on 1st January, 1938, was given by Mr. A. P. Herbert, M.P., last Wednesday. He offered the advice, especially to poor people, not to write to members of Parliament for legal advice, but to go to a lawyer or to the Poor Persons Committee or to a magistrate.

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (30th June, 1932) 2%. Next London Stock Exchange Settlement, Thursday, 9th September, 1937.

	Div. Months.	Middle Price 1 Sept. 1937.	Flat Interest Yield. £ s. d.	‡ Approximate Yield with redemption £ s. d.
ENGLISH GOVERNMENT SECURITIES				
Consols 4% 1957 or after	FA	107½	3 14 5	3 9 1
Consols 2½%	JAJO	74½	3 7 4	—
War Loan 3½% 1952 or after	JD	100½	3 9 8	3 9 2
Funding 4% Loan 1960-90	MN	110½	3 12 5	3 6 9
Funding 3% Loan 1959-69	AO	95	3 3 2	3 5 2
Funding 2¾% Loan 1952-57	JD	92½	2 19 6	3 5 4
Funding 2½% Loan 1956-61	AO	87¼	2 17 4	3 5 6
Victory 4% Loan Av. life 22 years	MS	107¼xd	3 14 7	3 10 6
Conversion 5% Loan 1944-64	MN	113⅛	4 8 5	2 12 1
Conversion 4½% Loan 1940-44	JJ	106½	4 4 10	2 7 4
Conversion 3½% Loan 1961 or after	AO	99½xd	3 10 4	—
Conversion 3% Loan 1948-53	MS	98½	3 0 11	3 2 6
Conversion 2½% Loan 1944-49	AO	94¾xd	2 12 9	3 0 6
Local Loans 3% Stock 1912 or after	JAJO	85½	3 10 2	—
Bank Stock	AO	339½	3 10 8	—
Guaranteed 2¾% Stock (Irish Land Act) 1933 or after	JJ	77	3 11 5	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	84	3 11 5	—
India 4½% 1950-55	MN	112	4 0 4	3 6 10
India 3½% 1931 or after	JAJO	92	3 16 1	—
India 3% 1948 or after	JAJO	78	3 16 11	—
Sudan 4½% 1939-73 Av. life 27 years	FA	110	4 1 10	3 17 11
Sudan 4% 1974 Red. in part after 1950	MN	109	3 13 5	3 2 11
Tanganyika 4% Guaranteed 1951-71	FA	108	3 14 1	3 4 9
L.P.T.B. 4½% " T.F.A." Stock 1942-72	JJ	105	4 5 9	3 5 6
Lon. Elec. T. F. Corpn. 2½% 1950-55	FA	86	2 18 2	3 11 3
COLONIAL SECURITIES				
Australia (Commonw'th) 4% 1955-70	JJ	104	3 16 11	3 13 10
Australia (Commonw'th) 3% 1955-58	AO	89	3 7 5	3 15 4
Canada 4% 1953-58	MS	107	3 14 9	3 8 6
*Natal 3% 1929-49	JJ	99	3 0 7	3 2 3
New South Wales 3½% 1930-50	JJ	97	3 12 2	3 16 0
New Zealand 3% 1945	AO	97	3 1 10	3 9 5
Nigeria 4% 1963	AO	110	3 12 9	3 8 4
Queensland 3½% 1950-70	JJ	96	3 12 11	3 14 4
South Africa 3½% 1953-73	JD	101	3 9 4	3 8 4
Victoria 3½% 1929-49	AO	98	3 11 5	3 14 2
CORPORATION STOCKS				
Birmingham 3% 1947 or after	JJ	86½	3 9 4	—
Croydon 3% 1940-60	AO	95	3 3 2	3 6 3
*Essex County 3½% 1952-72	JD	102	3 8 8	3 6 8
Leeds 3% 1927 or after	JJ	84	3 11 5	—
Liverpool 3½% Redeemable by agreement with holders or by purchase	JAJO	99	3 10 8	—
London County 2½% Consolidated Stock after 1920 at option of Corp.	MJSD	71	3 10 5	—
London County 3% Consolidated Stock after 1920 at option of Corp.	MJSD	83	3 12 3	—
Manchester 3% 1941 or after	FA	83	3 12 3	—
Metropolitan Consd. 2½% 1920-49	MJSD	94	2 13 2	3 2 2
Metropolitan Water Board 3% " A " 1963-2003	AO	87½	3 8 7	3 9 9
Do. do. 3% " B " 1934-2003	MS	87	3 9 0	3 10 2
Do. do. 3% " E " 1953-73	JJ	93½	3 4 2	3 6 3
*Middlesex County Council 4% 1952-72	MN	108	3 14 1	3 6 2
* Do. do. 4½% 1950–70	MN	113	3 19 8	3 5 3
Nottingham 3% Irredeemable	MN	84¼	3 11 0	—
Sheffield Corp. 3½% 1968	JJ	101½	3 9 0	3 8 5
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS				
Gt. Western Rly. 4% Debenture	JJ	105½	3 15 10	—
Gt. Western Rly. 4½% Debenture	JJ	117½	3 16 7	—
Gt. Western Rly. 5% Debenture	JJ	128½	3 17 10	—
Gt. Western Rly. 5% Rent Charge	FA	127½	3 18 5	—
Gt. Western Rly. 5% Cons. Guaranteed	MA	124	4 0 8	—
Gt. Western Rly. 5% Preference	MA	116½	4 5 10	—
Southern Rly. 4% Debenture	JJ	104	3 16 11	—
Southern Rly. 4% Red. Deb. 1962-67	JJ	106½	3 15 1	3 12 1
Southern Rly. 5% Guaranteed	MA	125	4 0 0	—
Southern Rly. 5% Preference	MA	113½	4 8 1	—

*Not available to Trustees over par.
‡In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.

1937

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Stock
37.

Approximate Yield with Redemption
£ s. d.
3 9 1
—
3 9 2
3 6 9
3 5 2
3 5 4
3 5 6
3 10 6
2 12 1
2 7 4
—
3 2 6
3 0 6
—
—
—
—
—
3 6 10
—
—
3 17 11
3 2 11
3 4 9
3 5 6
3 11 3
3 13 10
3 15 4
3 8 6
3 2 3
3 16 0
3 9 5
3 8 4
3 14 4
3 8 4
3 14 2
—
3 6 3
3 6 8
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—
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3 2 2
3 9 9
3 10 2
3 6 3
3 6 2
3 5 3
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3 8 5
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3 12 1
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